**IN THE SUPREME COURT OF GUAM**

**GLORINA Q. PEREZ, Administratrix, of the ESTATE OF AGUEDA G. ROBERTO**
Plaintiffs-Appellants

**vs.**

**JOSE T. GUTIERREZ, FLORENCE S. GUTIERREZ and JOE and FLO'S, INC., a Guam corporation,**
Defendants-Appellees

# OPINION

**Filed: May 15, 2001**

**Cite as: 2001 Guam 9**

Supreme Court Case No. CVA98-035
Superior Court Case No. CV0547-90

Appeal from the Superior Court of Guam
Argued and submitted on August 19, 1999
Hagåtña, Guam


Appearing for Plaintiffs-Appellants:
F. Randall Cunliffe, Esq.
Cunliffe & Cook, P.C.
Suite 200
210 Archbishop Flores Street
Hagåtña, Guam 96910

Appearing for Defendants-Appellees:
Paul A. Lawlor, Esq.
Attorney at Law
Suite 903, PDN Building
238 Archbishop Flores Street
Hagåtña, Guam 96910

BEFORE: RICHARD H. BENSON, Chief Justice (Acting),[1] JOHN A. MANGLONA, Designated Justice, and MARK E. COWAN, Justice *Pro Tempore*.

**COWAN, J.:**

**[1]** In 1990, Glorina Q. Perez ("Glorina") in her capacity as Administratrix of the Estate of Agueda G. Roberto ("Agueda") filed this action to cancel a deed of gift of real property executed in 1971 by Agueda. Agueda was, at the time of execution of the deed, and remained until her death in 1982, a judicially declared incompetent person. The grantee of the deed was her brother and judicially appointed guardian, Jose T. Gutierrez ("Jose"). Jose's wife, Florence ("Florence"), was a co-grantee of the deed and both, with another party, were Defendants in this action. The trial court held that the Complaint was barred by the applicable statute of limitations and by the doctrine of laches. On appeal Appellant alleges that the statute of limitations and the doctrine of laches are not available as defenses in this action. We hold that the defense of statute of limitations is available and affirm the trial court's decision on that ground.

**I.**

**[2]** The facts giving rise to this case stretch over a period of nearly forty years and are many and complicated. Moreover, the facts involve other judicial proceedings. Agueda was once married to Juan Aguon Roberto ("Juan"). Juan was, with his sister Dolores, the owner of Lot No. 165, Ylig, Guam. Juan died intestate in 1961 leaving Agueda as his widow. In 1968, Agueda's brother, Jose, successfully petitioned the court to appoint him as her guardian on the basis that she was

[1] The Chief Justice recused himself from this case and as the next senior panel member, Justice Benson was appointed Acting Chief Justice.

incompetent. In 1971, Agueda executed a deed of gift transferring Lot No. 165-2 to Jose and Florence. Agueda's competency was never restored by the court, and Jose remained her guardian until her death in 1982. In 1989 during the consolidated probate of Juan and Dolores' estate, Eulalia Cepeda ("Eulalia") was found to be Juan's daughter from a previous relationship, *In the Matter of the Estate of Roberto,* PR006-61 and PR0080-58 (Super. Ct. Guam July 13, 1989) (consolidated probate of Juan and Dolores)(decision on the heirship of Eulalia). It does not appear that Juan had any children other than Eulalia. In the probate proceedings of Agueda's estate, Superior Court of Guam Probate Case No. PR332-89, apparently initiated in 1989, Eulalia nominated and successfully moved the probate court to appoint Glorina as Administratrix of Agueda's estate. Glorina, in 1990, filed this action. In 1994, in the consolidated probate of the Estates of Juan and Dolores, the court determined Eulalia in her own right was entitled to a one-fourth share of Lot No. 165, an interest not at issue in this action, and the Estate of Agueda or her successors in interest also entitled to a one-fourth share in Lot No. 165. *Id.* (Super. Court of Guam, Jan. 7. 1994)(Decree of Final Distribution). However, as noted above, in 1971 Agueda had conveyed Lot No. 165 to Gutierrez.[2]

**[3]** In 1998, trial on the Complaint for Cancellation of Deed of Gift was held before an advisory jury. The jury found that Agueda was incompetent at the time the deed was executed and that it should be set aside. However, the jury also found that Glorina's complaint was barred by the statute

[2] Although the reasoning behind this distribution was not detailed in the Court's order of distribution, presumably Eulalia as the sole surviving child, and Agueda as the surviving spouse of Juan who died intestate, were each distributed one-half of Juan's separate property, namely his share of Lot No. 165, pursuant to section 221 of the Probate Code of Guam, enacted in 1953 and in effect at the time of the relevant deaths, now codified at Title 15 GCA § 903. The court's order of distribution was consistent with the conclusion that Juan's interest in Lot No. 165 was separate property and not community property of himself and Agueda. Further, Eulalia's claim of interest in the Estate of Agueda presumably derives from section 229 of the Probate Code of Guam. Pursuant to that section, in the event Agueda died intestate, and without issue, separate property acquired from Agueda's previously deceased husband, Juan, would pass to Juan's children (Eulalia).

of limitations and the doctrine of laches. The trial court found that although Agueda was incompetent, the complaint to cancel the deed was barred by the statute of limitations, set forth in Guam Civil Procedure Code § 328, and the doctrine of laches. This appeal followed.

**II.**

**[4]** This court has jurisdiction on an appeal from a final judgment. Title 7 GCA § 3107 (1994).

**[5]** Whether the Complaint is barred by the applicable statute of limitations is a question of law to be reviewed *de novo*. *Gayle v. Hemlani*, 2000 Guam 25, ¶ 22.

**III.**

**[6]** We begin by disposing of Gutierrez's procedural complaints. Gutierrez argues that Glorina has failed to comply with Guam Rule of Appellate Procedure 7 on the ordering of transcripts. As the issues presented on appeal are questions of law, we choose to exercise our discretion granted by GRAP 7 and deny Gutierrez's request. Gutierrez also argues that Guam Rule of Appellate Procedure 13(m) was violated by Glorina's failure to identify where in the record she raised the issues before the trial court now brought forth on appeal. Glorina responds that the issues were raised in a Motion for Directed Verdict and in her trial brief. However, these documents were not included in the Court's Record or in Appellant's Excerpts of Record and this court is unable to verify Glorina's claims hereto. With specific regard to the statute of limitations issue, Gutierrez alleges first that he was entitled to a jury on this issue and then that Glorina failed to show that she objected to the jury instruction on this issue in violation of Guam Rule of Civil Procedure 51. He

argues that this court must presume that the issue was not properly preserved for appeal.

**[7]** We hold that the issue of whether a statute of limitations bars an action to cancel a deed signed by an incompetent grantor may be asserted as a defense in such as action, as presented by Glorina in this appeal, is a question of law. *See In Re Estate of Fincher*, 119 Cal.App.3d 343, 351, 174 Cal.Rptr. 18, 22-23 (Ct. App. 1981). The essential facts that underlie the issues of statute of limitations are Agueda's adjudicated incompetency, the dates of the deed, her death and the filing of this action. These are undisputed leaving no factual determinations left for a jury to consider. "Where there is no conflict in the evidence upon which the determination of a question of law rests, the decision is for the court and it should not be submitted to the jury." *Id.* 119 Cal.App.3d at 351, 174 Cal.Rptr. at 23. This is not to say that all statute of limitations issues should not be tried before a jury. It has been held that questions of fact and even mixed questions of law and fact on this issue may be submitted to a jury. *See Mitchell v. Towne*, 31 Cal.App.2d 259, 262, 87 P.2d 908, 910 (Dist. Ct. App. 1939) (citations omitted).

**[8]** The general issue raised on appeal is whether, after the death of one who had been judicially declared incompetent who executed a deed during incompetency, the defense of statute of limitations is available to the grantees of the deed in an action brought by the incompetent's representative. We hold that such a defense is available.

**A.**

**[9]** Nineteen years passed between Agueda's execution of the deed and the filing of this Complaint to cancel the deed, and seven years elapsed between Agueda's death and the filing of this

Complaint. It is Glorina's assertion that no statute of limitations bars an action to set aside a deed executed by an incompetent grantor. Glorina claims that because Agueda was incompetent by judicial declaration at the time the deed was executed, under Guam Civil Code § 40, it is void and no title passed.[3] Glorina argues that section 3412 of the Civil Code permits a wholly void instrument to be cancelled by legal action at any time. This section provides: "**Cancellation, when ordered**. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or cancelled." Guam Civ. Code § 3412 (1970) (now codified at 20 GCA § 3250).

**[10]** Glorina offers no case law to support her specific proposition that a deed, void because of grantor incompetency, is not subject to any statute of limitations. Her reliance on the case of *Hironymous v. Hiatt*, 52 Cal.App. 727, 199 P. 850 (Dist. Ct. App. 1921), is misplaced. The *Hironymous* court held that section 3412 of the California Civil Code (identical to GCC § 3412) was not applicable in an action to cancel a written promise to give a gift. *Id.* 52 Cal. App. at 736-737, 199 P. at 853-854. The distinction between the promise of a gift and a deed of gift immediately conveying one's interest in property is critical. As the court in *Hironymous* stated, a gift is a transfer of property without consideration and a gift of a promissory note payable in the future does not create an enforceable obligation. *Id.* 52 Cal. App. at 735, 199 P. at 853. In the present case, at issue is a deed of gift of real property. The deed purported to transfer Agueda's interest in the real

[3] This section provides: "**Powers of persons whose incapacity has been adjudged**. After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity." Guam Civ. Code § 40 (1970) (now codified at 19 GCA § 1114).

property immediately to Gutierrez. This is not the same as a promise to make a gift. Glorina's reliance on the case of *Duty v. Abex Corp.*, 214 Cal.App.3d 742, 263 Cal.Rptr. 13 (Ct. App. 1989), is equally misplaced. The *Duty* case simply illustrates that lawmakers are free to allow certain legal actions to be brought at any time and makes the observation that the *Hironymous* decision, distinguished above, stands for the general proposition that certain proceedings may be brought at any time if the legislature does not specify a statute of limitations for such proceedings. *Id.* 214 Cal.App.3d at 749, 263 Cal.Rptr. at 16. Thus, neither the *Hironymous* nor the *Duty* cases involve the specific statute of limitations issue we face in the instant appeal.

**[11]** Glorina cites three cases, *Hellman Commercial Trust & Savings Bank v. Alden*, 206 Cal. 592, 275 P. 794 (1929), *Bryce v. O'Brien*, 5 Cal.2d 615, 55 P.2d 488 (1936), and *Montgomery v. Bank of America National Trust & Savings Ass'n*, 85 Cal.App.2d 559, 193 P.2d 475 (Dist. Ct. App. 1948), to support her contention that an instrument that is void cannot pass good title. However, none of these cases involve the issue of the application of the statute of limitations to an action to cancel a void deed or instrument. Glorina's contention that no statute of limitation applies to such an action, and that such an action can be brought at any time is countered by the decision of the California Supreme Court in the case of *Moss v. Moss*, 20 Cal.2d 640, 128 P.2d 526 (1942). In that case, the plaintiff sued to cancel a contract that he entered into with his wife in order to procure a divorce from her, on the ground that such a contract was illegal, void and against public policy. *Id.* 20 Cal.2d at 641-642, 128 P.2d at 527. The defendant raised the defense of statute of limitations, which the plaintiff contended was unavailable in an action to cancel an instrument void as against public policy. *Id.* 20 Cal.2d at 644-645, 128 P.2d at 528-529. The court held the action barred by the

statute of limitations. *Id.* 20 Cal.2d at 645, 128 P.2d at 529. *Moss* demonstrates that a statute of limitations may bar an action to challenge a void instrument. The Supreme Court of California's authorities cited in support of its decision show that the holding applies to void instruments whether or not they are in violation of public policy. *Id.*

**[12]** Gutierrez argues that the Complaint is barred by the "catch all" limitation set forth in section 343 of the Civil Procedure Code. This section provides: **"Actions for relief not hereinbefore provided for**. An action for relief not hereinbefore provided for must be commenced within four (4) years after the cause of action shall have accrued." Guam Civ. Proc. Code § 343 (1970) (current version codified at 7 GCA § 11312).

**[13]** The Guam Code of Civil Procedure was adopted from California and cases from that state construing the code sections, though not absolutely binding, are of much guidance to this court and are persuasive. *See Custodio v. Boonprakong*, 1999 Guam 5, ¶11; *People v. Quenga*, 1997 Guam 6, n. 4.

**[14]** We note at least one California case which supports the proposition that section 343 is applicable in an action to cancel a deed due to a grantor's incompetency. In *Boyd v. Lancaster*, 56 Cal.App.2d 103, 132 P.2d 214 (Dist. Ct. App. 1942), an action was filed to set aside a deed because of a grantor's incompetence. The deed was executed in October of 1931 and the action to set it aside was filed in August of 1935. *Id.* 56 Cal.App.2d at 105, 132 P.2d at 216. Among other defenses, the grantee challenged the action on the basis that it was barred by the statute of limitations. However, the court held that the action was filed less than four years after the deed was obtained and was therefore not barred by the statute of limitations. *Id.* 56 Cal.App.2d at 111, 132 P.2d at 218-219.

While the *Boyd* court did not mention a specific statute, a later case, *In re Estate of Pieper*, 224 Cal. App. 2d 670, 689, 37 Cal.Rptr. 46, 59 (Dist. Ct. App. 1964), interpreted *Boyd's* four year limit as referring to section 343. *Id*. The *Pieper* case involved an action to remove the administrator of an estate and to invalidate a certain deed from the decedent to the administrator based on nondelivery of the deed. The administrator raised a statute of limitations defense in his answer to the complaint claiming that the action to set aside the deed was barred by sections 336, 337, 338, 339 and 343 of the California Code of Civil Procedure. *Id.* 224 Cal.App.2d at 688, 37 Cal.Rptr. at 59. The *Pieper* court, in reviewing the applicability of the aforementioned sections in a case to invalidate a deed due to nondelivery, noted that section 343 was found in *Boyd* to be applicable in setting aside a deed on the basis of the grantor's incompetency. *Id.* 224 Cal.App.2d at 689, 37 Cal.Rptr. at 59. Thus, while *Pieper's* actual holding is inapplicable to the case at bar, it does help to clarify *Boyd*.

**[15]** In contrast to the *Boyd* case, another California decision, *Wade v. Busby*, 66 Cal.App.2d 700, 152 P.2d 754 (Dist. Ct. App. 1944) suggests that if insanity is properly pled, section 328 or 352 may apply. *Id.* 66 Cal.App.2d at 702, 152 P.2d at 755. In *Wade*, the administratrix of the grantor's estate sought to set aside a deed executed by the grantor while incompetent. The *Wade* court acknowledged that insanity may void disposition of property but refused to find that an allegation of incompetency was equivalent to an allegation of insanity for the tolling of the statute of limitations in either section 328 or 352 of the California Code of Civil Procedure. *Id.* 66 Cal.App.2d at 702-703, 152 P.2d at 755.

//

//

**[16]** However, with regard to insanity, this court previously defined the term in the case of *Custodio v. Boonprakong*, 1999 Guam 5, where we held:

> that insanity, for the purposes of Guam's tolling statute [GCPC § 352], turns on the determinative issue of whether a person has demonstrated a severe mental impairment that effects [sic] his or her ability to comprehend rights or acts that he would otherwise understand. Absent this ability to comprehend, the time in which to commence a cause of action is tolled until the disability ends.

*Id.* at ¶ 15. Under this broad definition of insanity, legal incompetence, pursuant to the definition in GCC § 40, is easily encompassed. We are compelled to adopt this holding and apply its definition of insanity to Guam Civil Procedure Code § 328.

**[17]** Section 328 provides:

> **Certain Disabilities Excluded From Time to Commence Actions**. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same is, at the time such title first descends or accrues, either:
>
> (1) Under the age of majority; or
> (2) Insane.
>
> The time, not exceeding twenty (20) years, during which such disability continues is not deemed any portion of the time in this Article limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability, but such action shall not be commenced, or entry or defense made, after that period.

Guam Civ. Proc. Code § 328, amended by P.L. 13-187:36 (now codified at 7 GCA 11215). This section tolls the statute of limitations for a maximum of twenty years of disability. It provides that an action must be brought within five years after the disability ceases or after the death of the person entitled.

**[18]** Section 352 is similar to section 328 in that it tolls the time for an action to be filed if the person entitled is insane.[4] However, section 352, unlike section 328, contains no provision for the death of the insane person and to that extent is inapplicable to the case at bar.

**[19]** We also note that whereas section 343 is a catchall rule designed to provide a time limit for all other actions not specifically provided for, section 328 specifically applies to actions to recover real property and provides the time limit in cases of incompetency by way of insanity or minority, which fits precisely the facts of the instant case. If conflicting statutes cannot be reconciled, the specific must prevail over the general. *See Pacific Rock Corp. v. Department of Educ.*, 2000 Guam 19, ¶¶ 25-26 (holding that the Guam Procurement Law is a comprehensive statute providing a mandatory scheme of administrative and judicial remedies and prevails over the Government Claims Act in an action to recover under a contract awarded pursuant to the Procurement Law).

**[20]** Thus, we hold, as did the trial court, that section 328 is applicable in this case to set aside a deed because of a grantor's incompetency. We now determine whether this action was filed within the statute of limitations set by section 328.

//

---

[4] Section 352 provides:

> If a person entitled to bring an action, mentioned in Chapter III of this Title, be, at the time the cause of action accrued, either:
>
> > (1) A minor; or
> > (2) Insane; or
> > (3) A married woman, and her husband be a necessary party with her in commencing such action;
>
> the time of such disability is not a part of the time limited for the commencement of the action.

Guam Civ. Proc. Code § 352, amended by P.L. 13-187:27 (now codified at 7 GCA § 11404).

**[21]** The following dates and circumstances are not disputed: (1) Agueda was legally incompetent when she executed the deed on June 10, 1971; (2) Agueda died on October 29, 1982 while under legal incompetency; and (3) the present action was filed by the administratrix of Agueda's estate on June 18, 1990. Therefore, pursuant to section 328, Agueda's disability tolled the time limit for filing an action to recover her real property until her death, and any such action should have been filed within five years her death. This action was filed more than seven years past her death. In a normal case, the administrator could have brought the action to cancel the deed at any time before the five years ran and need not have waited for a determination of heirship. Thus, we must hold that Glorina's action is barred by the statute of limitations. Such a rule is important, because if, as Glorina urges, the time to file an action runs from the date of determination of heirship, it could result in uncertainty of land titles for decades after the death of the person entitled and question the reliability of land records, an important goal of recording and land registration laws.

**[22]** Glorina argues that if a statute of limitations applies, it began to run in1989 when Eulalia was judicially determined to be an heir of Juan. To support this argument, Glorina categorizes her action as one to remove a cloud on the title of property distributed to Agueda in the probate of Juan's estate by the 1994 Decree of Distribution. However, Glorina fails to show how the determination that Eulalia was Juan's heir bears on Agueda's right or the time within which to bring this action. This action, which Glorina has filed as personal representative of Agueda, could have been filed at any time after Agueda executed the deed. The action is in effect an action on behalf of Agueda or her successors in interest to set aside the deed. As discussed below, the statue of limitations upon an action to cancel the deed was tolled until Agueda's disability terminated upon her death. After

Agueda's death, her personal representative could bring the action to set aside the deed at any time within the applicable state of limitations. Nothing in section 328 suggests that the statue of limitations is suspended indefinitely until administration of Agueda's estate is initiated, or heirship issues determined. While Eulalia has been determined to be Juan's heir, so far as the record shows, there still has been no determination of heirship to Agueda's estate, yet Glorina has properly brought this action to set aside the deed for the benefit of whoever may be determined to be entitled to the distribution of Agueda's interest in the property, from Agueda's estate. Unfortunately the action was brought after expiration of the applicable statute of limitations.

**[23]** We note that in cases of fraud or mistake, section 338 of the Civil Procedure Code provides a three year statute of limitation from the discovery of the fraud or mistake. While Glorina alleged fraud in her Complaint, this issue was not addressed in the trial court's decision and not brought up on appeal. Thus, it plays no part in our consideration of this appeal. We must add that this opinion does not condone a guardian getting a deed from his incompetent ward, but nothing in the record shows what happened between Agueda's death in 1982 and the filing of the Complaint in 1990 which might have been the basis for a tolling argument or an estoppel to assert the statute of limitations. Issues of fraud, the date of discovery of the fraud, if any, and of whether the statute of limitations should be tolled or defendants estopped are factual issues which if present below were either not determined, or determined adversely to Glorina and not pursued on this appeal.

//

//

//

**B.**

**[24]** In addition to the statute of limitations bar, the trial court held that Glorina's claim was also barred by the doctrine of laches. Because we affirm the trial court's decision on the statute of limitations ground, we find it unnecessary to address the laches issue.

**[25]** Defendant's cross-appeal, asking this court, but only if it were to reverse the judgment in favor of defendants below, to hold that the trial court committed error in not dismissing this action for failure to join indispensable parties. Defendants assert that if this court affirms the trial court, the issue of indispensable parties is moot and need not be addressed. However, neither the conditional nature of their cross-appeal, nor their characterization of the issue as moot necessarily disposes of the issue, as the issue of joinder of indispensable parties is one that can be raised at any time, including by an appellate court, which may raise and act upon the issue *sua sponte*. *See Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111, 88 S.Ct. 733, 738-739 (1968); *UOP v. United States*, 99 F.3d 344, 347 (9th Cir. 1996); *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994).

**[26]** The asserted indispensable parties are persons that were transferred interests in the property involved in this action by the named defendants. It appears from the briefs that Jose and Florence, the original grantees, and named defendants in this action, do not presently retain any ownership interest in the subject property, that a sixty-four percent interest therein is held by the named defendant Joe & Flo's Inc., and that the remaining interests are held by certain other individuals. These individuals are co-tenants, and transferees from defendants of interests in the property at issue.

**[27]** As co-tenants and assignees holding interests of record in real property, which derive from the deed at issue in this case, they appear to be within the class of persons to be joined if feasible under the provisions of Guam Rule of Civil Procedure 19(a)(2)-(i). Rule 19 requires joinder of such persons if subject to service of process and if joinder would not deprive the court of jurisdiction. There is no indication in the record of inability to join any of these defendants.

**[28]** It is unclear why plaintiff did not join them in the action, in particular as portions of the complaint refer to the transfers to them. The absence of these parties was not raised by defendants in their answer, or by motion prior to filing their answer as required by Guam Rule of Civil Procedure 12(b), nor was any application made for determination of this issue before trial as provided by Rule 12(d). The issue of non-joinder of these additional parties was instead first raised by the named defendants after trial by jury and entry by the jury of its verdict herein, which was adverse to the named defendants on all questions presented to the jury other than the issue of statute of limitations and laches.

**[29]** The court below held the decision adverse to Glorina on these issues rendered the matter moot, but further found that the allegedly indispensable parties were each present through various stages of the trial, some present throughout the entire trial, all had full knowledge of the proceedings and many of them testified as witnesses. The court found that it would be inequitable to allow a motion for dismissal after return of the verdict. However, timing does not bar consideration of the issue, since as noted above, it may be raised *sua sponte* by the court, even on appeal. The court may consider, among other factors, "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. . . . [and the] public stake in settling disputes by wholes,

whenever possible . . . ." *Provident Bank & Trust Co.*, 390 U.S. at 111, 88 S.Ct. at 739.

**[30]** However, defendant in its cross-appeal has asked that we consider the issue only in the event we reverse the decision of the trial court on the other issues raised, which we have not done, and in the circumstances of this case we decline to exercise our discretion to consider the issue *sua sponte.* The granting of the motion below would have left the underlying issues between the parties unresolved, and could have given the defendants who had been joined in the action and who had fully litigated it the opportunity to re-litigate the issues which had been determined adversely to them in the event the decisions of the jury on the statute of limitations and laches were not sustained. There appears to be no prejudice to any of the named parties from non-joinder of additional interested parties. To the extent there was any such prejudice, there should also be taken into account any contribution of the parties thereto; the plaintiffs chose who to name in this action, and the defendants chose the timing of their motion. The non-joined parties are not adversely affected by the judgment. "The purpose of Fed.R.Civ.P. 19(a)(2)(i) is to protect the legitimate interests of absent parties, as well as to discourage multiplicitous litigation." *United States. ex rel. Morongo Band of Mission Indians. v. Rose*, 34 F.3d 901, 908 (9th Cir. 1994). Consideration of the issue appears unnecessary to avoid prejudice, and may ultimately have the effect of giving one side of this controversy or the other, or possibly both the opportunity to re-litigate those issues in the case determined adversely to it, the timeliness issues in the case of the plaintiff, and the other issues in the case as to the defendants, and therefore to promote rather than discourage multiplicity of litigation.

## IV.

**[31]** In an action to cancel a deed due the incompetence of the grantor, we hold that the defense of statute of limitations is available. The trial court's decision is **AFFIRMED**, therefore the Appellee's Cross-Appeal need not be considered and is **DISMISSED**.

JOHN A. MANGLONA
Designate Justice

MARK E. COWAN
Justice *Pro Tempore*

RICHARD H. BENSON
Chief Justice (Acting)